

services" described in Section 271(g).⁵⁷² Since we conclude that Congress did not intend to apply a separate affiliate requirement in this context, we need not address whether the provision of video programming would qualify as an "information service" under Section 272(a)(2)(C), or exercise our authority under Section 272(f)(3).⁵⁷³ Rather, we will adhere to Congress' intent and decline to impose a separate affiliate requirement here.

I. Advanced Telecommunications Incentives

1. Notice

250. Section 706(a) of the 1996 Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."⁵⁷⁴ In the *Notice*, we sought comment on how we could achieve Congress' goals in the context of open video systems.⁵⁷⁵

2. Discussion

251. The Telecom. Industry Assn. argues that, because an open video system operator will need to build excess capacity for unaffiliated programming providers (which could also be used to provide advanced telecommunications), the Commission can fulfill its obligation to ensure advanced technology deployment by adopting a deregulatory approach to open video systems.⁵⁷⁶

⁵⁷²See, e.g., U S West Reply Comments at 5-7 (arguing that the distribution of video programming by a LEC qualifies as an "incidental interLATA service," under Section 272); NYNEX Reply Comments at 6, n.13. Section 271(g) defines "incidental interLATA services," among other things, as the interLATA provision by a BOC or its affiliate: (1) of audio programming, video programming, or other programming services to subscribers of such company or affiliate; (2) the capability for interaction by such subscribers to select or respond to such audio programming, video programming or other programming services; and (3) to distributors of audio programming or video programming that such company or affiliate owns or controls. Communications Act § 271(g)(1)(A)-(C), 47 U.S.C. § 271(g)(1)(A)-(C).

⁵⁷³Section 272(f)(3) provides: "Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity."

⁵⁷⁴1996 Act § 706(a).

⁵⁷⁵*Notice* at para. 73.

⁵⁷⁶Telecom. Industry Assn. Reply Comments at 3. Similarly, BroadBand Technologies argues that a deregulatory approach to open video systems by the Commission would encourage the deployment of open video systems and would therefore fulfill in part the Commission's obligations under Section 706(a). See BroadBand Technologies

In particular, the Telecom. Industry Assn. proposes that the Commission adopt an "upgrade incentive plan" similar to that adopted for cable operators in MM Docket 93-215.⁵⁷⁷ According to the Telecom. Industry Assn., an open video system upgrade incentive plan could encourage the deployment of open video and provide a critical vehicle for fulfilling Congress' mandate that we encourage the deployment of advanced telecommunications services to all Americans (including elementary schools and classrooms).⁵⁷⁸

252. We agree with the Telecom. Industry Assn. that the open video system framework offers an opportunity to further the goals of both fostering competition, upgrading infrastructure, and providing a vehicle for the deployment of advanced telecommunications services to all consumers. In order to promote the development of broadband capabilities for consumers, the Commission will consider proposals that encourage open video system deployment of advanced telecommunications services as defined in Section 706. While we believe that the open video system framework should provide operators with the incentives and flexibility to deploy advanced telecommunications, we believe that this additional approach should also be available on a case-by-case basis for open video system operators that can demonstrate a need for additional deregulatory measures to successfully deploy advanced telecommunications services to all consumers.

IV. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

253. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-12, the Commission's final analysis with respect to the *Second Report and Order* is as follows:

254. *Need and purpose of this action:* The Commission, in compliance with Section 302(a) of the Telecommunications Act of 1996 pertaining to open video systems, is required to adopt rules and procedures necessary to implement this section of the Telecommunications Act of 1996.

255. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis:* Collectively, the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, CA; the City

Reply Comments at 4-5.

⁵⁷⁷See Telecom. Industry Assn. Reply Comments at 7-8; Ex Parte Letter from Jot Carpenter, Jr., Vice President, Government Relations, Telecommunications Industry Association, dated May 20, 1996. See also *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Report and order and Further Notice of Proposed Rulemaking)*, MM Docket No. 93-215, FCC 94-39 (rel. March 30, 1994) at paras. 295-304.

⁵⁷⁸Telecom. Industry Assn. Ex Parte Letter at 2.

of Chillicothe, OH; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, MO; the City of Santa Clara, CA; and the City of Tallahassee, FL filed reply comments in response to the Initial Regulatory Flexibility Analysis. These reply comments assert that a significant number of small governmental entities will be burdened by the proposals of the Commission and commenters. The Commission has considered these reply comments and has attempted to structure the open video system rules set forth in this *Second Report and Order* so as to minimize the administrative burden upon small governmental entities.

256. *Significant alternatives considered:* Petitioners representing cable interests, telephone interests, programming interests, consumer interests and local government interests submitted several alternatives aimed at minimizing administrative burdens. In this proceeding, the Commission has considered these alternatives and has attempted both to accommodate the concerns raised by the parties and to minimize the administrative burdens upon the parties in accordance with Congress' desire for the Commission to develop a streamlined regulatory model for open video service operators.

V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

257. The requirements adopted in the *Second Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Second Report and Order* as required by the 1995 Act.⁵⁷⁹ OMB comments are due 60 days from date of publication of this *Second Report and Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

258. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of the *Second Report and Order* in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the *Second Report and Order* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via

⁵⁷⁹Pub. L. No. 104-13

the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov

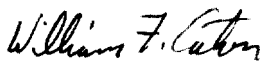
VI. ORDERING CLAUSES

259. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 573 the rules, requirements and policies discussed in this *Second Report and Order* ARE ADOPTED and Sections 76.1000 and 76.1500 through 76.1515 of the Commission's rules, 47 C.F.R. §§ 76.1000 and 76.1500 through 1515, ARE AMENDED as set forth in Appendix B.

260. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register.

261. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *Second Report and Order* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

Appendix A

Parties Filing Comments and Reply Comments

Comments

Access 2000

Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, and People for the American Way (Alliance for Community Media, et al.)

Alliance for Public Technology

American Cable Entertainment; Bresman Communications Co., Ltd.; Greater Media, Inc.; Cable Telecommunications Association of Georgia; Cable Telephone Association of Maryland, Delaware and the District of Columbia; New Jersey Cable Telecommunications Association; Ohio Cable Telecommunications Association; South Carolina Cable Television Association; Tennessee Cable Television Association; Texas Cable & Telecommunications Association; Wisconsin Cable Communications Association (American Cable, et al.)

Association of America's Public Television Stations (Assn. of Public Television Stations)

Association of Local Television Stations, Inc (Assn. of Local Television Stations)

AT&T Corporation (AT&T)

Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company, Bell South Corporation and BellSouth Telecommunications, Inc., GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc., Lincoln Telephone and Telegraph Company, Pacific Bell, SBC Communications, Inc. and Southwestern Bell Telephone Company (Telephone Joint Commenters)

Cablevision Systems Corporation and The California Cable Television Association (Cablevision Systems/CCTA)

Cable Telecommunications Association (CATA)

Capital Cities/ABC, Inc. (ABC)

CBS, Inc. (CBS)

Cities of Dallas, Denton, Houston, Plano, Fort Worth, Arlington, Irving, Longview, and Brownfield, TX (Texas Cities)

City of Arvada, CO (City of Arvada)

City and County of Denver, CO (City of Denver)

City of Indianapolis, IN (City of Indianapolis)

City of Milton, WA (City of Milton)

City of Mountain View, CA (City of Mountain View)

City of Olathe, KS (City of Olathe)

City of Seattle Department of Administrative Services (City of Seattle)

Comcast Cable Communications, Inc., Adelphia Communications Corporation and InterMedia Partners, L.P. (Comcast, et al.)

Community Broadcasters Association (Community Broadcasters Assn.)

Continental Cablevision, Inc. (Continental)

Cox Communications, Inc. (Cox)
Electric Industries Association, Consumer Electronics Manufacturers Association, and
Consumer Electronics Retailers Coalition (EIA, et al.)
General Instrument Corporation (General Instrument)
General Services Administration (GSA)
Golden Orange Broadcasting Co., Inc. (Golden Orange Broadcasting)
Greater Metro Cable Consortium (Greater Metro Cable)
Group W Satellite Communications (Group W)
Home Box Office (HBO)
MCI Telecommunications Corporation (MCI)
MFS Communications Company, Inc. (MFS Communications)
Motion Pictures Association of America, Inc. (MPAA)
National Association of Broadcasters (NAB)
National Association of Regulatory Utility Commissioners (NARUC)
National Basketball Association, National Hockey League, & National Football League
(NBA, et al.)
National Broadcasting Company, Inc. (NBC)
National Cable Television Association, Inc. (NCTA)
National League of Cities; The United States Conference of Mayors; The National Association
of Counties; The National Association of Telecommunications Officers and Advisors;
Montgomery County, Maryland; The City of Los Angeles, CA; The City of Chillicothe, OH; The
City of Dearborn, Michigan; The City of Dubuque, Iowa; The City of St. Louis, MI; The City
of Santa Clara, CA; and The City of Tallahassee, FL. (National League of Cities, et al.)
National Telephone Cooperative Association (NTCA)
New York City Department of Information Technology and Telecommunications (New York
City)
New York State Department of Public Service (State of New York)
NYNEX Corporation (NYNEX)
Office of the Commissioner of Baseball (Commissioner of Baseball)
Pennsylvania Public Utility Commission (Pennsylvania PUC)
People of the State of California and the Public Utilities Commission of the State of California
(State of California)
Political Subdivisions of the State of Minnesota (Minnesota Cities)
Rainbow Programming Holdings, Inc. (Rainbow)
Residential Communications Networks, Inc. (Residential Communications)
State of New Jersey, Department of the Treasury Division of the Ratepayer Advocate (State of
New Jersey Ratepayer Advocate)
State of New Jersey Board of Public Utilities' Office of Cable Television (State of New
Jersey Bd. of Pub. Util.)
Tandy Corporation (Tandy)
Tele-Communications, Inc. (TCI)
Telecommunications Industry Association (Telecom. Industry Assn.)
Time Warner Cable (Time Warner)
U S West, Inc. (U S West)

United States Telephone Association (USTA)
UTC, The Telecommunications Association (UTC)
Viacom, Inc. (Viacom)

Reply Comments

Access Houston Cable Corporation (Access Houston)
Access Sacramento
Access 2000
Access Tucson
Adelphia Communications Corporation, and Suburban Cable TV Co., Inc. (Adelphia/Suburban Cable)
Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, People for the American Way, and the Office of Communication of the United Church of Christ (Alliance for Community Media, et al.)
American Cable Entertainment; Bresman Communications Co., Ltd.; Greater Media, Inc.; Cable Telecommunications Association of Georgia; Cable Telephone Association of Maryland, Delaware and the District of Columbia; New Jersey Cable Telecommunications Association; Ohio Cable Telecommunications Association; South Carolina Cable Television Association; Tennessee Cable Television Association; Texas Cable & Telecommunications Association; Wisconsin Cable Communications Association (American Cable, et al.)
Association of Local Television Stations, Inc (Assn of Local Television Stations).
AT&T Corporation (AT&T)
Bartholdi Cable Company, Inc. (Bartholdi Cable)
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company, Bell South Corporation and BellSouth Telecommunications, Inc., GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc., Lincoln Telephone and Telegraph Company, Pacific Bell, SBC Communications, Inc and Southwestern Bell Telephone Company (Telephone Joint Commenters)
Boston Neighborhood Network (BNN TV3)
BroadBand Technologies, Inc. (BroadBand)
California Cable Television Association (CCTA)
Cambridge Community Television (Cambridge Community TV)
Capital Cities/ABC, Inc. (ABC)
Chicago Access Corporation (Chicago Access)
Cincinnati Community Video
City of Ann Arbor, Michigan (City of Ann Arbor)
City of Boston, Massachusetts (City of Boston)
City of Charlotte and County of Mecklenburg, North Carolina (City of Charlotte)
City and County of Denver, Colorado (City of Denver)
City of Dayton, Ohio (City of Dayton)

City of Encinitas, California (City of Encinitas)
City of Indianapolis, Indiana (City of Indianapolis)
City of Kalamazoo, Michigan (City of Kalamazoo)
City of Lake Forest, Illinois (City of Lake Forest)
City of Laurel, Maryland (City of Laurel)
City of Pocatello, Idaho (City of Pocatello)
City of Portland, Oregon (City of Portland)
City of Quincy, Washington (City of Quincy)
City of Richardson, Texas (City of Richardson)
City of St. Paul, Minnesota (City of St. Paul)
City of Santa Ana, California (City of Santa Ana)
City of Somerville, Massachusetts (City of Somerville)
City of Tucson (City of Tucson)
Community Broadcasters Association (Community Broadcasters Assn.)
Community Television of Prince George's (PG County Community TV)
Cox Communications, Inc. and Comcast Cable Communications, Inc. (Cox/Comcast)
Electronic Industries Association, Consumer Electronics Manufacturers Association, and
Consumer Electronics Retailers Coalition (EIA, et al.)
ESPN, Inc. (ESPN)
General Instrument Corporation (General Instrument)
General Services Administration (GSA)
Independent Cable & Telecommunications Association (Independent Cable Assoc.)
Information Technology Industry Council (Info. Tech. Indus. Council)
MCI Telecommunications Corporation (MCI)
Metropolitan Area Communications Commission (Oregon Cities)
Metropolitan Dade County (Dade County)
MFS Communications Company, Inc. (MFS Communications)
Miami Valley Cable Council (Miami Valley)
Michigan, Illinois and Texas Communities (Michigan Cities, et al.)
Minneapolis Telecommunications Network (Minneapolis Telecom. Network)
Motion Pictures Association of America, Inc. (MPAA)
Municipalities of Buffalo Grove, Elk Grove, Hoffman Estates, Rolling Meadows, and Palatine,
Illinois (Regional Cable Group)
Multnomah Community Television (Multnomah Community TV)
National Association of Broadcasters (NAB)
National Cable Television Association, Inc. (NCTA)
National League of Cities; The United States Conference of Mayors; The National
Association of Counties; The National Association of Telecommunications Officers and
Advisors; Montgomery County, Maryland; The City of Los Angeles, CA; The City of
Chillicothe, OH; The City of Dearborn, Michigan; The City of Dubuque, Iowa; The City
of St. Louis, MI; The City of Santa Clara, CA; and The City of Tallahassee, FL.
(National League of Cities, et al.)
New York City Department of Information Technology and Telecommunications (New York
City)

Northern Dakota County Cable Communications Commission (North Dakota Cable Commission)
Northern Dakota County Community Television Corp (North Dakota Community TV)
NYNEX Corporation (NYNEX)
Optel, Inc. (Optel)
Orange County, Florida (Orange County)
Pitt County (Pitt County)
Plymouth Community Channel 3 (Plymouth Channel 3)
Political Subdivisions of the State of Minnesota (Minnesota Cities)
Public Access Corporation of the District of Columbia (D.C. Public Access Corp.)
Quote . . . Unquote, Inc. (Quote . . . Unquote)
Residential Communications Networks, Inc. (Residential Communications)
Schopeg Access, Inc. (Schopeg Access)
Starsight Telecast, Inc. (Starsight)
State of Hawaii
Telecommunications Industry Association (Telecom Industry Assn.)
Tele-TV
Time Warner Cable (Time Warner)
U S West, Inc. (U S West)
United States Telephone Association (USTA)
Viacom, Inc. (Viacom)

Reply Comments to the Initial Regulatory Flexibility Analysis

National League of Cities; The United States Conference of Mayors; The National Association of Counties; The National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; The City of Los Angeles, CA; The City of Chillicothe, OH; The City of Dearborn, Michigan; The City of Dubuque, Iowa; The City of St. Louis, MI; The City of Santa Clara, CA; and The City of Tallahassee, FL. (National League of Cities, et al. Reply Comments on IRFA)

Ex Parte Filings

Letter from The Honorable Tom Barrett, U.S. House of Representatives, to The Honorable Reed Hundt, Chairman, Federal Communications Commission, April 1, 1996.

Letter from The Honorable Daniel K. Akaka, U. S. Senate, to Ms. Judith L. Harris, Director of Office of Legislative Affairs, Federal Communications Commission, April 4, 1996.

Letter from The Honorable Anna G. Eshoo, U.S. House of Representatives, to The Honorable Reed Hundt, Chairman, Federal Communications Commission, April 11, 1996.

Letter from The Honorable Neil Abercrombie, U.S. House of Representatives, to The Honorable Reed Hundt, Chairman, Federal Communications Commission, April 12, 1996.

Letter from The Honorable Sam M. Gibbons, U.S. House of Representatives, to the Director, Office of Legislative Affairs, Federal Communications, April 24, 1996.

Letter from The Honorable Tom Campbell, U.S. House of Representatives, to The Honorable Reed Hundt, Chairman, Federal Communications Commission, April 25, 1996.

Letter from Tom Reeser, Executive Director, Oceanside Community Television, to Federal Communications Commission, May 13, 1996 (Oceanside Community Television Ex Parte Comments)

Fujitsu Network Switching of America, Inc. (Fujitsu Ex Parte Comments)

Appendix B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1000 is amended by adding notes to paragraphs (e) and (h) to read as follows:

§ 76.1000 Definitions.

* * * * *

(e) * * *

Note to paragraph (e): A video programming provider that provides more than one channel of video programming on an open video system is a multichannel video programming distributor for purposes of this subpart O and Section 76.1507

* * * * *

(h) * * *

Note to paragraph (h): Satellite programming which is primarily intended for the direct receipt by open video system operators for their retransmission to open video system subscribers shall be included within the definition of satellite cable programming.

* * * * *

3. Section 76.1004 is amended by designating the existing text as paragraph (a), and adding paragraph (b) to read as follows:

* * * * *

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers in such a way that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest, unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and the Commission determines in accordance with Section 76.1002(c)(4) that such arrangement is in the public interest.

4. A new Subpart S is added to Part 76 to read as follows:

Subpart S - Open Video Systems

- § 76.1500 Definitions.
- § 76.1501 Qualifications to be an open video system operator.
- § 76.1502 Certification.
- § 76.1503 Carriage of video programming providers on open video systems.
- § 76.1504 Rates, terms and conditions for carriage on open video systems.
- § 76.1505 Public, educational and governmental access.
- § 76.1506 Carriage of television broadcast signals.
- § 76.1507 Competitive access to satellite cable programming.
- § 76.1508 Network non-duplication.
- § 76.1509 Syndicated program exclusivity.
- § 76.1510 Application of certain Title VI provisions.
- § 76.1511 Fees.
- § 76.1512 Programming information.
- § 76.1513 Dispute resolution.
- § 76.1514 Bundling of video and telephone services.

Subpart S - Open Video Systems

§ 76.1500 Definitions.

(a) Open video system. A facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part.

(b) Open video system operator ("operator"). Any person or group of persons who provides cable service over an open video system and directly or through one or more affiliates

owns a significant interest in such open video system, or otherwise controls or is responsible for the management and operation of such an open video system.

(c) Video programming provider. Any person or group of persons who has the right under the copyright laws to select and contract for carriage of specific video programming on an open video system.

(d) Activated channels. This term shall have the same meaning as provided in the cable television rules, 47 CFR § 76.5(nn).

(e) Shared channel. Any channel that carries video programming that is selected by more than one video programming provider and offered to subscribers.

(f) Cable service. This term shall have the same meaning as provided in the cable television rules, 47 CFR § 76.5(ff).

(g) Other terms. Unless otherwise expressly stated, words not defined in this part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in Part 47 of the Code of Federal Regulations.

§ 76.1501 Qualifications to be an open video system operator.

Any person may obtain a certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act, 47 U.S.C. § 573(a)(1), except that an operator of a cable system, regardless of any other service that the cable operator may provide, may not obtain such a certification within its cable service area unless it is subject to "effective competition," as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). A cable operator that is not subject to effective competition within its cable service area may file a petition with the Commission, seeking a finding that particular circumstances exist that make it consistent with the public interest, convenience, and necessity to allow the operator to convert its cable system to an open video system. Nothing herein shall be construed to affect the terms of any franchising agreement or other contractual agreement.

Note 1: An example of a circumstance in which the public interest, convenience and necessity would be served by permitting a cable operator not subject to effective competition to become an open video system operator within its cable service area is where the entry of a facilities-based competitor into its cable service area would likely be infeasible.

§ 76.1502 Certification.

(a) An operator of an open video system must certify to the Commission that it will comply with the Commission's regulations in 47 CFR §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513. If construction of new physical plant is required, the Commission must

approve such certification prior to the commencement of construction. If no new construction is required, the Commission must approve such certification prior to the commencement of service at such a point in time that would allow the applicant sufficient time to comply with the Commission's notification requirements.

(b) Certifications must be verified by an officer or director of the applicant, stating that, to the best of his or her information and belief, the representations made therein are accurate.

(c) Certifications must be filed on FCC Form 1275 and must include:

(1) The applicant's name, address and telephone number;

(2) A statement of ownership, including all affiliated entities;

(3) If the applicant is a cable operator applying for certification in its cable franchise area, a statement that the applicant is qualified to operate an open video system under Section 76.1501

(4) A statement that the applicant agrees to comply and to remain in compliance with each of the Commission's regulations in §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513;

(5) If the applicant is required under 47 CFR § 64.903(a) of this chapter to file a cost allocation manual, a statement that the applicant will file changes to its manual at least 60 days before the commencement of service;

(6) A general description of the anticipated communities or areas to be served upon completion of the system;

(7) The anticipated amount and type (i.e., analog or digital) of capacity (for switched digital systems, the anticipated number of available channel input ports); and

(8) A statement that the applicant will comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers.

(d) Comments or oppositions to a certification must be filed within five days of the Commission's receipt of the certification and must be served on the party that filed the certification. If the Commission does not disapprove certification within ten days after receipt of an applicant's request, the certification will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties.

§ 76.1503 Carriage of video programming providers on open video systems.

(a) Non-discrimination principle. Except as otherwise permitted in applicable law or in this part, an operator of an open video system shall not discriminate among video programming providers with regard to carriage on its open video system, and its rates, terms and conditions for such carriage shall be just and reasonable and not unjustly or unreasonably discriminatory.

(b) Demand for carriage. An operator of an open video system shall solicit and determine the level of demand for carriage on the system among potential video programming providers in a non-discriminatory manner

(1) Notification. An open video system operator shall file with the Secretary of the Federal Communications Commission a "Notice of Intent" to establish an open video system, which the Commission will release in a Public Notice. The Notice of Intent shall include the following information:

(i) A heading clearly indicating that the document is a Notice of Intent to establish an open video system,

(ii) The name, address and telephone number of the open video system operator;

(iii) A description of the system's projected service area;

(iv) A description of the system's projected channel capacity, in terms of analog, digital and other type(s) of capacity upon activation of the system;

(v) A description of the steps a potential video programming provider must follow to seek carriage on the open video system, including the name, address and telephone number of a person to contact for further information;

(vi) The starting and ending dates of the initial enrollment period for video programming providers;

(vii) The process for allocating the system's channel capacity, in the event that demand for carriage on the system exceeds the system's capacity; and

(viii) A certification that the operator has complied with all relevant notification requirements under the Commission's open video system regulations concerning must-carry and retransmission consent (Section 76.1506), including a list of all local commercial and non-commercial television stations served, and a certificate of service showing that the Notice of Intent has been served on all local cable franchising authorities entitled to establish requirements concerning the designation of channels for public, educational and governmental use.

(2) Information. An open video system operator shall provide the following information to a video programming provider within five business days of receiving a written request from the provider, unless otherwise included in the Notice of Intent:

(i) The projected activation date of the open video system. If a system is to be activated in stages, the operator should describe the respective stages and the projected dates on which each stage will be activated;

(ii) A preliminary carriage rate estimate;

(iii) The information a video programming provider will be required to provide to qualify as a video programming provider, e.g., creditworthiness;

(iv) Technical information that is reasonably necessary for potential video programming providers to assess whether to seek capacity on the open video system, including what type of customer premises equipment subscribers will need to receive service;

(v) Any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system; and

(vi) The equipment available to facilitate the carriage of unaffiliated video programming and the electronic form(s) that will be accepted for processing and subsequent transmission through the system.

(3) Qualifications of video programming providers. An open video system operator may impose reasonable, non-discriminatory requirements to assure that a potential video programming provider is qualified to obtain capacity on the open video system.

(c) One-third limit. If carriage demand by video programming providers exceeds the activated channel capacity of the open video system, the operator of the open video system and its affiliated video programming providers may not select the video programming services for carriage on more than one-third of the activated channel capacity on such system.

(1) Measuring capacity. For purposes of this section:

(i) If an open video system carries both analog and digital signals, an open video system operator shall measure analog and digital activated channel capacity independently;

(ii) Channels that an open video system is required to carry pursuant to the Commission's regulations concerning public, educational and governmental channels and must-carry channels shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall not be included in the one-third of capacity on which the open video system operator is permitted to select programming where demand for carriage exceeds system capacity;

(iii) Channels that an open video system operator carries pursuant to the Commission's regulations concerning retransmission consent shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent that the channels are carried as part of the programming service of the operator or its affiliate, subject to paragraph (c)(1)(iv); and

(iv) Any channel on which shared programming is carried shall be included in "activated channel capacity" for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be

included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent the open video system operator or its affiliate is one of the video programming providers sharing such channel.

Note to paragraph (c)(1)(iv): For example, if the open video system operator and two unaffiliated video programming providers each carry a programming service that is placed on a shared channel, the shared channel shall count as 0.33 channels against the one-third amount of capacity allocable to the open video system operator, where demand for carriage exceeds system capacity.

(2) Allocating capacity. An operator of an open video system shall allocate activated channel capacity through a fair, open and non-discriminatory process; the process must be insulated from any bias of the open video system operator and verifiable.

(i) If an open video system carries both analog and digital signals, an open video system operator shall treat analog and digital capacity separately in allocating system capacity.

(ii) Subsequent changes in capacity or demand. An open video system operator must allocate open capacity, if any, at least once every three years, beginning three years from the date of service commencement. Open capacity shall be allocated in accordance with this section. Open capacity shall include all capacity that becomes available during the course of the three-year period, as well as capacity in excess of one-third of the system's activated channel capacity on which the operator of the open video system or its affiliate selects programming. An operator shall maintain a file of qualified video programming providers who have requested carriage or additional carriage since the previous allocation of capacity. Information regarding how a video programming provider should apply for carriage must be made available upon request.

Note 1 to paragraph (c)(2): An open video system operator will not be required to comply with the regulations contained in this section if there is no open capacity to be allocated at the end of the three year period.

Note 2 to paragraph (c)(2): An open video system operator shall be required to accommodate changes in obligations concerning public, educational or governmental channels or must-carry channels in accordance with Sections 611, 614 and 615 of the Communications Act and the regulations contained in this part.

(iii) Channel sharing. An open video system operator may carry on only one channel any video programming service that is offered by more than one video programming provider (including the operator's video programming affiliate), provided that subscribers have ready and immediate access to any such programming service. Nothing in this section shall be construed to impair the rights of programming services.

Note 1 to paragraph (c)(2)(iii): An open video system operator may implement channel sharing only after it becomes apparent that one or more video programming services will be

offered by multiple video programming providers. An open video system operator may not select, in advance of any duplication among video programming providers, which programming services shall be placed on shared channels.

Note 2 to paragraph (c)(2)(iii): Each video programming provider offering a programming service that is carried on a shared channel must have the contractual permission of the video programming service to offer the service to subscribers. The placement of a programming service on a shared channel, however, is not subject to the approval of the video programming service or vendor.

Note 3 to paragraph (c)(2)(iii): Ready and immediate access in this context means that the channel sharing is "transparent" to subscribers

(iv) Open video system operator discretion. Notwithstanding the foregoing, an operator of an open video system may:

(A) Require video programming providers to request and obtain system capacity in increments of no less than one full-time channel; however, an operator of an open video system may not require video programming providers to obtain capacity in increments of more than one full-time channel;

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage; and

(C) Refuse carriage on its open video system to a competing, in-region cable operator or its affiliates that offers cable service to subscribers located in the service area of the open video system, except where the allocation of open video system capacity to a competing cable operator is consistent with the public interest, convenience, and necessity.

Note to paragraph (c)(2)(iv)(C): The Commission will except situations where it is determined that facilities-based competition will not be significantly impeded. We will provide a specific exception in a situation in which: (1) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (2) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

(3) Nothing in this paragraph shall be construed to limit the number of channels that the open video system operator and its affiliates, or another video programming provider, may offer to provide directly to subscribers. Co-packaging is permissible among video programming providers, but may not be a condition of carriage. Video programming providers may freely elect whether to enter into co-packaging arrangements.

Note to paragraph (c)(3): Any video programming provider on an open video system may co-package video programming that is selected by itself, an affiliated video programming provider and/or unaffiliated video programming providers on the system.

§ 76.1504 Rates, terms and conditions for carriage on open video systems.

(a) Reasonable rate principle. An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory.

(b) Differences in rates.

(1) An open video system operator may charge different rates to different classes of video programming providers, provided that the bases for such differences are not unjust or unreasonably discriminatory

(2) An open video system operator shall not impose different rates, terms, or conditions based on the content of the programming to be offered by any unaffiliated video programming provider.

(c) Just and reasonable rate presumption. A strong presumption will apply that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where any rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator.

(d) Examination of rates. Complaints regarding rates shall be limited to video programming providers that have sought carriage on the open video system. If a video programming provider files a complaint against an open video system operator meeting the above just and reasonable rate presumption, the burden of proof will rest with the complainant. If a complaint is filed against an open video system operator that does not meet the just and reasonable rate presumption, the open video system operator will bear the burden of proof to demonstrate, using the principles set forth below, that the carriage rates subject to the complaint are just and reasonable.

(e) Determining just and reasonable rates subject to complaints. Carriage rates subject to complaint shall be presumed just and reasonable if they are no greater than an imputed carriage rate based on the following:

The imputed rate will reflect what the open video system operator, or its affiliate, "pays" for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the

pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

§ 76.1505 Public, educational and governmental access.

(a) An open video system operator shall be subject to public, educational and governmental access requirements for every cable franchise area with which its system overlaps.

(b) An open video system operator must ensure that all subscribers receive any public, educational and governmental access channels within the subscribers' franchise area.

(c) An open video system operator may negotiate with the local cable franchising authority of the jurisdiction(s) which the open video system serves to establish the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment. These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.

(d) If an open video system operator and a local franchising authority are unable to reach an agreement regarding the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment within the local franchising authority's jurisdiction:

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by connecting with the

cable operator's public, educational and governmental access channel feeds and by sharing the costs directly related to supporting public, educational and governmental access, including costs of public, educational and governmental access services, facilities and equipment, and equipment necessary to achieve the connection. The open video system operator must provide the same amount of public, educational and governmental access as the local cable operator is required to carry.

(2) The local franchising authority shall impose the same rules and procedures on an open video system operator as it imposes on the local cable operator with regard to the open video system operator's use of channel capacity designated for public, educational and governmental access use when such capacity is not being used for such purposes.

(3) The local cable operator is required to permit the open video system operator to connect with its public, educational and governmental access channel feeds. The open video system operator and the cable operator may decide how to accomplish this connection, taking into consideration the exact physical and technical circumstances of the cable and open video systems involved. If the cable and open video system operator cannot agree on how to accomplish the connection, the local franchising authority may decide. The local franchising authority may require that the connection occur on government property or on public rights of way.

(4) The costs of connection and maintaining public, educational and governmental access channel capacity, services, facilities and equipment shall be divided equitably between the cable operator and the open video system operator. Shared costs shall include capital contributions and any other costs or investments directly relating to or supporting public, educational and governmental access and required by the cable operator's franchise agreement. Capital expenses incurred prior to the open video system operator's connection shall be subject to cost sharing on a pro-rata basis to the extent such investments have not been fully amortized by the cable operator.

(5) The local franchising authority may not impose public, educational and governmental access obligations on the open video system operator that would exceed those imposed on the local cable operator.

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the open video system operator shall be required to maintain the previously existing public, educational and governmental access terms of that franchise agreement. Absent a previous cable franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable

system with a commitment to provide public, educational and governmental access.

Note to paragraph (d)(6): If a cable system converts to an open video system, the operator will be required to maintain the previously existing terms of its public, educational and governmental access obligations.

(7) The open video system operator must adjust its system(s) to comply with new public, educational and governmental access obligations imposed by a cable franchise renewal; provided, however, that an open video system operator will not be required to displace other programmers using its open video system to accommodate public, educational and governmental access channels. The open video system operator shall comply with such public, educational and governmental access obligations whenever additional capacity is or becomes available, whether it is due to increased channel capacity or decreased demand for channel capacity.

(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in Section 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's connection and/or cost sharing obligations under this section.

(e) If an open video system operator maintains an institutional network, as defined in Section 611(f) of the Communications Act, the local franchising authority may require that educational and governmental access channels be designated on that institutional network to the extent such channels are designated on the institutional network of the local cable operator.

(f) An open video system operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this subsection, provided, however, that any open video system operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental facility for any programming which contains nudity, obscene material, indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. An open video system operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

§ 76.1506 Carriage of television broadcast signals

(a) The provisions of Subpart D shall apply to open video systems in accordance with the provisions contained in this subpart.

(b) For the purposes of this Subpart S, television stations are significantly viewed when they are viewed in households that do not receive television signals from multichannel video programming distributors as follows:

(1) For a full or partial network station -- a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and

(2) For an independent station -- a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent.

See § 76.1506(c).

Note to paragraph (b): As used in this paragraph, "share of viewing hours" means the total hours that households that do not receive television signals from multichannel video programming distributors viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of households that do not receive television signals from multichannel video programming distributors that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from multichannel video programming distributors in the survey area.

(c) Significantly viewed signals; method to be followed for special showings. Any provision of Section 76.54 that refers to a "cable television community" or "cable community or communities" shall apply to an open video system community or communities. Any provision of Section 76.54 that refers to "non-cable television homes" shall apply to households that do not receive television signals from multichannel video programming distributors. Any provision of Section 76.54 that refers to a "cable television system" shall apply to an open video system.

(d) Definitions applicable to the must-carry rules. Section 76.55 shall apply to all open video systems in accordance with the provisions contained in this section. Any provision of Section 76.55 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.55 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.55 that refers to the "principal headend" of a cable system as defined in section 76.5(pp) shall apply to the equivalent of the principal headend of an open video system. Any provision of section 76.55 that refers to a "franchise area" shall apply to the service area of an open video system.

(e) Signal carriage obligations. Any provision of section 76.56 that refers to a "cable television system" or "cable system" shall apply to an open video system. Any provision of section 76.56 that refers to a "cable operator" shall apply to an open video system operator. Section 76.56(d)(2) shall apply to open video systems as follows: An open video system operator shall make available to every subscriber of the open video system all qualified local commercial television stations and all qualified non-commercial educational television stations carried in fulfillment of its carriage obligations under this section.

(f) Channel positioning. Open video system operators shall comply with the provisions of section 76.57 to the closest extent possible. Any provision of section 76.57 that refers to a

"cable operator" shall apply to an open video system operator. Any provision of section 76.57 that refers to a "cable system" shall apply to an open video system, except the references to "cable system" in section 76.57(d) which shall apply to an open video system operator.

(g) Notification. Any provision of section 76.58 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.58 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.58 that refers to a "principal headend" shall apply to the equivalent of the principal headend for an open video system.

(h) Modification of television markets. Any provision of section 76.59 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.59 that refers to a "cable operator" shall apply to an open video system operator.

(i) Compensation for carriage. Any provision of section 76.60 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.60 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.60 that refers to a "principal headend" shall apply to the equivalent of the principal headend for an open video system.

(j) Disputes concerning carriage. Any provision of section 76.61 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.61 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.61 that refers to a "principal headend" shall apply to the equivalent of the principal headend for an open video system.

(k) Manner of carriage. Any provision of section 76.62 that refers to a "cable operator" shall apply to an open video system operator.

(l) Retransmission consent. Section 76.64 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provision of section 76.64 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.64 that refers to a "cable operator" shall apply to an open video system operator.

(2) Must-carry/retransmission consent election notifications shall be sent to the open video system operator. An open video system operator shall make all must-carry/retransmission consent election notifications received available to the appropriate programming providers on its system.

(3) Television broadcast stations are not required to make the same election for open video systems and cable systems in the same geographic area.

(4) An open video system commencing new operations shall notify all local commercial and noncommercial broadcast stations as required under paragraph (l) of this section on or before the date on which it files with the Commission its Notice of Intent to establish an open video system.

(m) Sports broadcast. Section 76.67 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provisions of section 76.67 that refers to a "community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(2) Notification of programming to be deleted pursuant to this section shall be served on the open video system operator. The open video system operator shall make all notifications immediately available to the appropriate video programming providers on its open video system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(n) Exemption from input selector switch rules. Any provision of Section 76.70 that refers to a "cable system" or "cable systems" shall apply to an open video system or open video systems.

(o) Special relief and must-carry complaint procedures. The procedures set forth in Section 76.7 shall apply to special relief and must-carry complaints relating to open video systems, and not the procedures set forth in Section 76.1514 (Dispute resolution). Any provision of Section 76.7 that refers to a "cable television system operator" or "cable operator" shall apply to an open video system operator. Any provision of Section 76.7 that refers to a "cable television system" shall apply to an open video system. Any provision of Section 76.7 that refers to a "system community unit" shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

§ 76.1507 Competitive access to satellite cable programming.

(a) Any provision that applies to a cable operator under Sections 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a)(1)-(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable